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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 198

NORMAN C. SCHALLER,

Petitioner,

vs.

CITY OF PHILADELPHIA.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF THE COMMONWEALTH
OF PENNSYLVANIA AND BRIEF IN SUPPORT
THEREOF.

MICHAEL FRANCIS DOYLE,
EDWARD I. CUTLER,
Counsel for Petitioner.

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**PETITION FOR WRIT OF CERTIORARI TO THE
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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Norman C. Schaller, respectfully prays that a Writ of Certiorari issue herein to review a certain final decision of the Superior Court of the State of Pennsylvania, and in support thereof presents the following statements, questions, and reasons:

I. Summary and Short Statement of the Matter Involved.

This is an action of assumpsit commenced by the City of Philadelphia, Pennsylvania, in the Municipal Court of Philadelphia, to establish petitioner's responsibility for a tax

upon his salary for 1940 under a City Income Tax Ordinance approved December 13, 1939. The statement of claim alleges that petitioner resides in the City of Philadelphia and is employed in the Philadelphia Navy Yard, a Federal Area, by the United States Government (R. 3). Petitioner has questioned the right of the City to exact such a tax from employes of the Federal Government engaged in defense work in Federal Areas during 1940, under the Constitution of the United States and the Act of October 9, 1940, 54 Stat. 1060, 4 U. S. C. A. § 14, by Affidavit of Defense Raising Questions of Law (R. 5).

The Municipal Court decided in favor of the City on the pleadings, in an opinion written by Judge Tumolillo (R. 6). Upon appeal, the Superior Court of Pennsylvania affirmed the judgment of the Municipal Court on March 13, 1942 (R. 20), followed by opinion rendered on March 30, 1942 (R. 14). Petitioner applied to the Supreme Court of Pennsylvania, the State court of last resort, for the allowance of an appeal (R. 21), but the appeal was refused on April 20, 1942 (R. 24).

II. Statement as to Jurisdiction.

(a) Statutory Provision Sustaining Jurisdiction.

The jurisdiction of the United States Court in this case is predicated on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936.

(b) State and Federal Statutes, the Validity of Which is Involved.

The State legislation involved consists of the Act of Assembly of the Commonwealth of Pennsylvania known as the Sterling Act of August 5, 1932, P. L. 45, 53 P. S. § 4613, the City of Philadelphia Income Tax Ordinance

approved December 13, 1939, and the Income Tax Regulations issued thereon by the City's Receiver of Taxes.

The Act of 1932 gave the City of Philadelphia general powers to levy:

“* * * taxes on persons, transactions, occupations, privileges, subjects and personal property within the limits of such city of the first or second class, as it shall determine. * * *”

“It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon any and all subjects upon which the Commonwealth has the power to tax but which it does not now tax or license” (R. 7).

The pertinent provisions of the City Income Tax Ordinance, which seeks to subject to tax all persons employed by any governmental body in Philadelphia, regardless of residence, and all residents of Philadelphia, regardless of where or by whom employed, are as follows:

“Employer. An individual, copartnership, association, corporation, governmental body or unit or agency, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis.”

“SECT. 2. IMPOSITION OF TAX. An annual tax for general revenue purposes of one and one-half per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after January 1, 1940, by residents of Philadelphia; and on (b) salaries, wages, commissions and other compensation earned after January 1, 1940, by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia; and on (c) the net profits earned after January 1, 1939, of businesses, professions or other activities conducted by such residents, and on (d) the net profits earned after January 1, 1939, of businesses,

professions or other activities conducted in Philadelphia by non-residents.

"The tax levied under (a) and (b) herein shall relate to and be imposed upon salaries, wages, commissions and other compensation paid by an employer or on his behalf to any person who is employed by or renders services to him. The tax levied under (c) and (d) herein shall relate to and be imposed on the net profits of any business, profession or enterprise carried on by any person as owner or proprietor, either individually or in association with some other person or persons."

"SECT. 4. COLLECTION AT SOURCE. Each employer within the City of Philadelphia who employs one or more persons on a salary, wage, commission or other compensation basis shall deduct, monthly or more often than monthly, at the time of the payment thereof, the tax of one and one-half per centum of salaries, wages, commissions or other compensation due by the said employer to the said employee and shall, on or before the fifteenth day of the month next following the said deduction make a return and pay to the Receiver of Taxes the amount of tax so deducted. Said return shall be on a form or forms furnished by or obtainable from the said Receiver of Taxes and shall set forth the names and residence of each employee of said employer during all or any part of the preceding month, the amounts of salaries, wages, commissions or other compensation earned during such preceding month by each of such employees, together with such other pertinent information as the Receiver of Taxes may require: Provided, however, That the failure or omission by any employer, either residing within or outside of the City, to make such return and/or pay such tax, shall not relieve the employee from the payment of such tax and the compliance with such regulations, with respect to making returns and payment thereof, as may be fixed in this ordinance or established by the Receiver of Taxes."

The regulations adopted by the Receiver of Taxes provide that anyone who is domiciled in Philadelphia is within the Ordinance:

“(h) The term ‘Resident’ means an individual, co-partnership, association, or other entity domiciled in the City of Philadelphia.”

The regulations further provide specifically that the ordinance applies to residents who render services anywhere as employees of the Federal Government and non-residents who render such services within the City of Philadelphia, in the following words:

“The following are the items subject to this tax:

(a) Salaries, bonuses or incentive payments received by an individual, whether directly or through an agent and whether in cash or in property, for services rendered on and after January 1, 1940.

(5) As an officer or employee (whether elected, or appointed, enlisted or commissioned) of a governmental administration, agency, arm, authority, board, body, branch, bureau, department, division, section or unit of the United States Government or of a corporation created and owned, or controlled by the United States Government or any of its agencies.”

The pertinent portions of the Act of Congress of October 9, 1940, 54 Stat. 1060, 4 U. S. C. A. § 14, the construction and validity of which are involved, provide:

“Sec. 2 (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in

any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940."

(c) Dates of Judgment and Application for Appeal.

The judgment of the Superior Court of Pennsylvania was rendered on March 13, 1942. The opinion followed on March 30, 1942. The application for the allowance of an appeal was filed in the Supreme Court of Pennsylvania on April 4, 1942, and that Court, by a *per curiam* order, refused to allow an appeal on April 20, 1942. This application for appeal is presented on the 2nd day of July, 1942.

(d) Nature of the Case, Federal Questions Raised, Rulings of the Court, Substantial Questions.

This was an action to recover municipal taxes on Petitioner's compensation received from the Federal Government as a defense worker in the Philadelphia Navy Yard.

The federal questions sought to be reviewed were first raised in the Municipal Court by Affidavit of Defense Raising Questions of Law, in the following words (R. 5):

"1. The Constitution and laws of the United States, including Act No. 819 of the 76th Congress, approved October 9, 1940, prohibit the plaintiff from exacting a tax on compensation received by defendant from the United States Government for services rendered in a Federal area during the year 1940.

"2. Plaintiff has no power under the Constitution and laws of the Commonwealth of Pennsylvania, including the Act of August 5, 1932, P. L. 45, to exact the aforementioned tax."

The Municipal Court rejected Petitioner's contention both as to the Federal Constitution and the Act of 1940. With respect to the Constitution, the Court stated (R. 8, 9):

"The decision of the United States Supreme Court in the case of *Graves v. O'Keefe*, 306 U. S. 466, definitely established the right of a state to include Federal employees in a general statute imposing a tax on incomes."

"The defendant offers the ingenious theory that because the President proclaimed a state of unlimited emergency on May 27, 1941, the City is prohibited from imposing a tax on Federal defense workers. He argues that if the tax may be imposed on the defendant, it can be imposed on residents of Philadelphia who enter the nation's armed forces. The certainty of an aroused and violent public opinion is sufficient insurance against any attempt by the Receiver of Taxes to impose the tax on persons who volunteer or who are inducted into the armed forces by virtue of the Selective Service Act. But the defendant is entitled to no such solicitous concern. He is a well paid civilian employee whose earnings for 1940 exceeded \$2500. There is no more reason to exempt workers at the Navy Yard from the provisions of the Wage Tax ordinance than there is to exempt the thousands of employees in private industry who are engaged in work vital to national defense."

Concerning the Act of 1940, the Court held (R. 8, 9):

"The defendant argues that the provisions of the Act of Congress approved October 9, 1940, Public Act No. 819 of the 76th Congress, 4 F. C. A. Section 13 et seq., prohibit the imposition of taxes on salaries earned during 1940 in Federal areas such as the Navy Yard.

"Section 2 (a) provides: 'No person shall be relieved from liability for any income tax levied by any state, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by rea-

son of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such state or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such state to the same extent and with the same effect as though such area was not a Federal area.'

"Section 2 (b) provides: 'The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.'

"The defendant contends that this must be construed as a prohibition on any tax on salaries earned in 1940. This argument would have force if the City attempted to tax the 1940 salaries of non-residents who work in the Navy Yard. But the defendant in this case is a resident of Philadelphia and the tax is imposed because of such residence and not because of the place he works. The City had authority to impose the tax irrespective of the Act of October 9, 1940, and hence is not affected by the provision that it shall not apply to salaries earned in 1940."

The refusal of the Municipal Court to sustain the Affidavit of Defense was assigned as error in the Superior Court (R. 13):

"2. The learned court below erred in overruling defendant's first point of law, as follows:

'1. The Constitution and laws of the United States, including Act No. 819 of the 76th Congress, approved October 9, 1940, prohibit the plaintiff from exacting a tax on compensation received by defendant from the United States Government for services rendered in a Federal area during the year 1940.' (R. 5.)

"Judgment of the court thereon:

'The defendant's questions of law are overruled and judgment is entered for the plaintiff in the sum of \$40.45, representing the amount of tax due thereon with interest at 6% and a penalty of one-half of one per cent per month for four months.' (R. 12.)"

On the constitutional objection, the Superior Court said (R. 17):

"When a former decision is overruled, the reconsidered pronouncement will be considered as the law from the beginning. *People ex rel. Rice v. Graves et al.*, 273 N. Y. S. 582, affirmed in 270 N. Y. 498, 200 N. Y. 288; *Certiorari denied*, 298 U. S. 683.

"Finally, defendant contends that, in any view, a State taxing unit may not burden the Federal Government with a tax upon those engaged in the national defense in time of war. (R. 19.)

"We may assume that the wages which defendant received from his federal employer are comparable with the wages paid by private employers for like services. If his contention were valid, the profits of manufacturers and all others who supply war materials would also be exempt from taxation. *Graves v. O'Keefe*, pp. 480, 481, refutes the argument in this language: The tax 'is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source is no longer tenable * * * and the only basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.' A tax of \$38.95 on an income of \$2,596.73 could not work that result."

The Superior Court also dismissed the Act of Congress of 1940 with the following statement (R. 18-19):

"Defendant's second contention is that even if the Sterling Act clothed the city with the power to tax

federal incomes, Congress on October 9, 1940, by Public Act No. 819, 54 Stat. 1060, 4 U. S. C. A. 14, has affirmatively prohibited a tax on such salaries earned prior to December 31, 1940, in a federal area such as the Philadelphia Navy Yard. The act, in effect, declared that residence within a federal area or the receipt of income from transactions occurring therein or 'services performed in such area' shall not relieve any person from liability for any income tax levied by any duly constituted taxing authority. The Act further provides that it shall be applicable only to income received after December 31, 1940. The relevant sections of the Act are quoted below.

"It is not necessary to refer to the reason for this Act. For our purpose we need only observe that it is no more than declarative of the existing law as established by *Graves v. O'Keefe*. The Act provides that it shall be applicable to income received after December 31, 1940, but nowhere in it is there any indication of congressional intent that incomes earned prior thereto shall be exempt. The power to grant tax exemptions, except where there is constitutional immunity, is at least doubtful; the United States Supreme Court in *Graves v. O'Keefe* referred to the question but did not find it necessary to answer it, p. 478. Since this Act creates no exemption it has no application to the question involved, except to recognize the city's power to tax incomes earned in a federal area after December 31, 1940. We know of no prohibition or exemption applicable to similar incomes earned after the decision in *Graves v. O'Keefe* and prior to that date."

This case raises substantial questions of Federal law not heretofore considered by the United States Supreme Court: Whether the decision in *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, was intended to apply to all persons employed by the Federal Government, without exception, regardless of the nature of their duties, their place of residence, and the surrounding circumstances; whether the

effect of a decision overruling prior decisions on the question of constitutionality is to render the prior decisions wholly inoperative and non-existent; whether the Act of October 9, 1940, 54 Stat. 1060, 4 U. S. C. A. § 14 prohibits local taxation of salaries earned by Federal employes in Federal areas prior to December 31, 1940; and whether Congress has the power to exempt Federal employes from local taxation.

The scope of the *O'Keefe case* has not been decided by your Honorable Court, and the present case raises the substantial question whether that ruling applies to all persons receiving compensation from the United States Government regardless of residence, regardless of the nature of their duties, regardless of the fact that their duties are performed in a Federal area, and regardless of the existing emergency.

Nor has this Court affirmatively decided whether the decisions overruled by the *O'Keefe case* are completely nullified and cannot ever be considered operative facts. The effect of that case is a question of constitutional law. It is involved in the present case by virtue of the opinion of the Court below that the earlier decisions are not to be considered as operative facts, in considering whether the Pennsylvania legislature intended to confer on the City of Philadelphia the power to tax Federal salaries and wages.

The question whether the Act of 1940 prohibits local taxation within Federal areas prior to December 31, 1940, is also a substantial Federal question, involving the interpretation of an Act of Congress not heretofore passed upon, namely, whether the permission to tax after that date, with the express limitation that it shall not apply to earlier transactions, does not constitute a prohibition of a tax on earnings before that date.

The further question raised is whether, assuming that a State could constitutionally tax salaries and wages earned

by government employees in Federal areas, Congress may nevertheless constitutionally prohibit such a tax, as petitioner contends under the Act of 1940.

III. The Questions Presented.

(a) Has a state or municipality the power to tax the compensation of all persons employed by the Federal Government, without exception, regardless of the nature of their duties, their place of residence, and the surrounding circumstances; particularly was the decision in *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, intended to apply to persons performing military, naval or defense duties?

(b) Did the *O'Keefe case* so completely nullify prior law that the cases which it overruled cannot be considered operative facts prior to the date of the *O'Keefe* decision?

(c) Did Congress, by the Act of October 9, 1940, 54 Stat. 1060, 4 U. S. C. A. § 14, intend to prohibit local taxation of salaries earned by federal employes in federal areas prior to December 31, 1940?

(d) If so, has Congress the power to prohibit local taxation of federal compensation?

IV. Reasons Relied On for the Allowance of the Writ.

None of the foregoing questions has ever been answered by this Court, the State court of last resort has not afforded a hearing on the issues presented, and the inferior courts did not adequately dispose of these questions. The questions raised are serious and vital to numerous residents of the City of Philadelphia who receive pay from the Federal Government, including those engaged in military duty outside the country for meagre remuneration, as well as non-residents who are performing their duties in the Government services within the City.

Petitioner presents herewith his brief in support of the petition.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Superior Court of Pennsylvania, requiring that court to certify the whole record of the case herein to this Court for review and determination.

NORMAN C. SCHALLER.